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upreme Court of the United States

OCTOBER TERM, 1974

No. .....

OMAS C. McCAIN, ERNEST WILLIAMS AND WIL-
LIAM SPENCER, INDIVIDUALLY AND ON BEHALF OF ALL
THOSE SIMILARLY SITUATED, PETITIONERS,

versus

ARLES E. LYBRAND, GENE HUIET, HENRY M.
HERLONG, ROY A. HARLING, AND W. T. TIM-
MERMAN, INDIVIDUALLY AND AS MEMBERS OF THE
COUNTY COUNCIL OF EDGEFIELD COUNTY; NORMAN
DORN, JOHN S. EDWARDS AND RICHARD A.
BEALS, INDIVIDUALLY AND AS MEMBERS OF THE BOARD
OF ELECTION COMMISSIONERS OF EDGEFIELD COUNTY,
SOUTH CAROLINA; AND J. M. PENDARVIS, INDIVIDU-
ALLY AND AS PRESIDENT OF THE EXECUTIVE COMMITTEE
OF THE DEMOCRATIC PARTY OF EDGEFIELD COUNTY, RE-
SPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals
the Fourth Circuit is unreported and is set out in Ap-
lix of Petition at 1a. The opinion of the District Court
. of Petition at 14a) is reported at 376 F. Supp. 304
C. S. C. 1974).

JURISDICTION

Respondents do not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I

Whether or not the Edgefield County Council election plan represents a proper balancing of interests, without such population variance among the districts, as to require the deletion on constitutional grounds, of the residence requirements imposed by State statute as a violation of the "one man, one vote" principle?

II

Whether or not the Per Curiam Opinion of the Fourth Circuit Court of Appeals reversing the District Court's Order granting Summary Judgment is a judgment or decree within the meaning of 28 U. S. C. § 1254(1) so as to make it a judgment ripe for review by the Supreme Court of the United States upon a Writ of Certiorari?

STATEMENT

Petitioners instituted the above-entitled action pursuant to 42 U. S. C. § 1983 seeking to have declared unconstitutional statutes which prescribe the method by which members of the County Council of Edgefield County, South Carolina, are elected.[1] This five-member County Council is the governing body of Edgefield County. The County is divided into five districts. Pursuant to 57 Stat. Act No. 521, § 2 (1971), the County Council is to be composed of

[1] In both the District and the Circuit Court, this case was heard with *Lytle v. Commissioners of Election of Union County*, Civil Action No. 74-237, reported at 376 F. Supp. 304 (D.C.S.C. 1974); Civil Action No. 74-1619, decided June 17, 1974, (4th Cir., 1974). The present Petition deals only with those portions of the Opinions concerning Edgefield County.

one resident councilman from each district with each councilman being elected by an at large vote of the qualified electors of the county.[2] The five districts vary somewhat in population as the following table, using voter registration figures, shows.[3]

Table I

District	*Voters*
1	1,578
2	913
3	1,576
4	844
5	758
Total	5,669

In the lower courts Petitioners contended that the residency requirement dilutes, in violation of the Equal Protection Clause of the Fourteenth Amendment, the votes of those persons who live in the more populous districts.

On May 16, 1974, the District Court entered an order granting summary judgment to the Petitioners in the *McCain* case as to their first cause of action only. In its order, the Court held unconstitutional the residency requirements for the Edgefield County Council and enjoined the operation of those requirements by directing that the councilmen in Edgefield County be elected at large without the imposition of the residency requirements upon any candidate. Respondents made application on May 17, 1974, before the District Court for a stay of its permanent injunctions con-

[2] "[T]he Edgefield County Council . . . shall be composed of five members. . . . One member . . . shall be elected by the county at large for each of the five districts of the county. . . ." 57 STAT. Act No. 521 § 2 at 990 (1971).

[3] Population figures cannot be accurately ascertained because census tracts do not coincide with voting precincts; however, Petitioners conceded below that voting registration figures provide a workable basis for discussing the "one man, one vote" principle. The figures contained in Table I were obtained from The South Carolina State Election Commission.

tained in its May 6, 1974, order pending appeal to the Fourth Circuit, which was denied by the District Court in an order dated May 22, 1974, filed on May 24, 1974. On May 31, 1974, however, upon motion of the Respondents, the Honorable Donald Russell, United States Circuit Judge, stayed the District Court's order during the pendency of Respondents' appeal.

On appeal to the Fourth Circuit, the District Court was reversed on June 17, 1974, with the Circuit Court finding that the Edgefield County plan represents a proper balancing of interests and does not result in an unconstitutional population variance. This Petition followed the Fourth Circuit's reversal of the District Court's Order granting Summary Judgment to the Petitioners.

ARGUMENT

I

The Edgefield County Council election plan represents a proper balancing of interest, without such population variance among the districts, as to require the deletion on constitutional grounds of the residence requirements imposed by State statute and does not violate the "one man, one vote" principle.

In *Dusch v. Davis,* 387 U. S. 112, 18 L. Ed. (2d) 656, 87 S. Ct. 1554 (1967) the Supreme Court of the United States approved an at large election plan for the City of Virginia Beach, Virginia, very similar to the election plan for the Edgefield County Council. The City of Virginia Beach consolidated with adjoining Princess Anne County, which possessed both rural and urban areas. The City charter was amended to provide for a borough form of government with four councilmen being elected at large without regard to residency and with seven be elected by the voters of the entire city, one being required to reside

in each of the City's seven boroughs. The variance in the population of the seven boroughs ranges from a low of 733 to 29,048.

> In upholding this voting plan, the Court observed: The Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen is elected by the vote of all the electors in the city. The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. . . .
>
> [T]he present consolidation plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or representation." He is nonetheless the city's, not the borough's councilman. 18 L. Ed. (2d) at 659.

Like the councilmen for Virginia Beach, the five councilmen for Edgefield County are elected by an at large vote of all the county electors. The Edgefield plan makes no distinction on the basis of race, creed, or economic status **or location**. The Edgefield plan uses districts of varying populations merely as a basis of residence, not as a basis for voting or representation.

The Court in *Dusch* drew an analogy between the residence requirements for the elections of state senators for a multi-district county upheld in *Fortson v. Dorsey*, 379 U. S. 433, 13 L. Ed. (2d) 401, 85 S. Ct. 498 (1965), and the Virginia Beach borough plan. In *Fortson* the Court stated:

> It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve

> the interests of all the people in the county, and not merely those of people in his home district; thus, in fact he is the county's and not merely the district's senator. 13 L. Ed. (2d) 401 at 404-405.

As in *Fortson* and *Dusch,* the tenure of the councilmen of Edgefield County depends upon the county-wide electorate. Consequently, an Edgefield County councilman must serve the interests of all the people of the county and is, therefore, the county's councilman and not merely the councilman for the district in which he resides.

Finally, in *Dusch* the Supreme Court spoke in terms of the Virginia Beach plan not preserving any "controlling influence" of the smaller boroughs.

> The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. 18 L. Ed. (2d) at 660.

The Court elaborated upon the meaning of the term "controlling influence" in a footnote.

> It is obvious that, if the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside [the two most populous borough], if united in their efforts, could elect all 11 councilmen even though the election were at large. 18 L. Ed. (2d), footnote 5 at 660.

The footnote does not read: "6 of the 11 councilmen"; rather it reads: "all 11 councilmen" only because the election is at large within the voting unit.

Similarly, under the Edgefield County Council plan the electors of the two most popular districts, Districts 1 and 3, in the County can elect all 5 councilmen. According to the voter registration figures quoted *supra* at —, it is mathematically impossible for the electors of the 3 smaller

districts to combine forces to elect all or a majority of the council. Because all candidates are voted upon by the county-wide electorate, the voters of Districts Numbers 1 and 3 in Edgefield County can determine who, among all of the candidates, will be the members of the county governing body. Voters residing in the smaller districts do not possess that power. "Controlling influence" is in the majority of the voters in Edgefield County. Thus, the plan used in Edgefield as in *Dusch*, does not preserve any controlling influence in the smaller areas of residence because voting is at large within the election unit.

II

The Per Curiam Opinion of the Fourth Circuit Court of Appeals reversing the District Court's Order granting Summary Judgment is not a judgment or decree within the meaning of 28 U. S. C. § 1254(1) so as to render it a judgment ripe for review by the Supreme Court of the United States upon Writ of Certiorari.

Petitioner brought this Petition pursuant to 28 U. S. C. § 1254(1).[4] Ordinarily, the Supreme Court will not issue a writ of certiorari to review a decree of a circuit court of appeals from an interlocutory order;[5] however, the power of the Court to do so is clear[6] and that power will be exercised in extraordinary situations. *American Construction Company v. Jacksonville, Tampa and Key West Railway Company*, 148 U. S. 372, 37 L. Ed. 486, 13 S. Ct. 758 (1893).

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[4] 28 U.S.C. § 1254 (1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

[5] *See: Chicago and Northwestern Railway Co. v. Osborne*, 146 U. S. 354, 36 L. Ed. 1002, 13 S. Ct. 281 (1892).

[6] *See: The Conqueror*, 166 U. S. 110, 41 L. Ed. 937, 17 S. Ct. 510 (1897); *United States v. The Three Friends*, 166 U. S. 1, 41 L. Ed. 897, 17 S. Ct. 495 (1897).

The decree from which Petitioners seek review is a Per Curiam order reversing the District Court's Order granting Summary Judgment. Although the *McCain* case was not remanded to the District Court, it was not finally disposed of either by the Fourth Circuit or by the District Court and still has not been heard upon the merits in the District Court.

> The question whether a decree is an interlocutory or a final one is often nice and difficult, ... Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit becomes quite unimportant by reason of the final result. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. 37 L. Ed. at 491.

Respondents respectfully contend that this is not a case where such "extraordinary inconvenience and embarrassment" will result in the event the Petition is denied; therefore, the Court should not issue a Writ of Certiorari to review the decree of the Circuit Court in this action, which did nothing more than reverse the granting of Summary Judgment to the Petitioners.

CONCLUSION

For the foregoing reasons, Respondents submit that Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,

C. TOLBERT GOOLSBY, JR.,
Deputy Attorney General,

KAREN LeCRAFT HENDERSON,
Assistant Attorney General,

M. ELIZABETH CRUM,
Assistant Attorney General,
Post Office Box 11549,
Columbia, S. C. 29211,

CHARLES W. COLEMAN,
Edgefield County Attorney,
Post Office Box 77,
Edgefield, S. C. 29824,
Attorneys for Respondents.